TARA SINGH OJAGER SINGH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL APPEAL NO. 109 OF 1984]
5 JULY 1986

CRIMINAL LAW AND PROCEDURE: *Cheating - Sections 420, 511 of Penal Code - Errors of learned President - Inadmissible evidence admitted - Incorrect assessment of witnesses and evidence - Effect.*

The appellant (an advocate and solicitor) was charged with three counts of offences under the Penal Code ("the Code"), namely cheating under ss. 420 and 511 of the Code. At the trial of the appellant the learned President found the appellant guilty on all three charges and sentenced him to one year's imprisonment on each charge, the sentences to run concurrently. The appellant then appealed contending that the learned President had allowed inadmissible evidence to be admitted.

Held:

[1] On a review of the grounds of judgment of the learned President and the relevant evidence, the learned President had made quite a few errors since some basic facts were wrong. Therefore any reasoning based on these wrong facts cannot be substantiated and any judgment arising therefrom is wholly unsatisfactory.

[2] Furthermore inadmissible evidence had been wrongly admitted and admissible evidence had not been admitted.

[3] Taking into account all the relevant circumstances and the inconsistencies and improbabilities and after an assessment of the evidence and the balance of probabilities, the appeal was allowed and the sentences and the conviction were quashed.

[Appeal allowed.]

Cases referred to:
Ah Mee v. PP [1967] 1 MLJ 220
Chao Chong & Ors. v. PP [1960] 26 MLJ 51
Syed Abu Bakar bin Ahmad v. PP [1984] CLJ (Rep) 368
Tengku Mahmood v. PP [1974] 1 MLJ 110

Legislation referred to:
Criminal Procedure Code, s. 64
Evidence Act 1950, s. 91

For the appellant - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the public prosecutor - Jalaldin bin Hussein, DPP

JUDGMENT

Mustapha Hussain J:

The appellant herein Tara Singh a/1 Ojager Singh was charged before the Sessions Court, Seremban, with three counts of offences, under the Penal Code, *viz:*

1st Charge

That you on the morning of 2 May 1981 at your office Tara & Associates, MARA Building, No. 21 Jalan Lemon, in the District of Seremban, in the State of Negeri Sembilan, cheated one Mohd. Yusoff bin Muda by dishonestly inducing him to deliver to you a sum of RM430 which was the property of the said Mohd. Yusoff bin Muda, by inducing him to believe that you were the developer of the scheme known as Taman Bukit Sitara and that the sum of RM430 was required as part payment of under counter money for the purchase of a terrace house in the scheme and the said Mohd. Yusoff bin Muda would not have paid you the said sum of money had he not been so deceived, and, that you, have thereby committed an offence punishable under s. 420 of the Penal Code.

2nd Charge

That you on or about 5 July 1981 at your office Tara & Associates, MARA Building, No. 21 Jalan Lemon, in the District of Seremban, in the State of Negeri Sembilan, cheated one Mohd. Yusoff bin Muda by dishonestly inducing him to deliver to you a sum of RM570 which was the property of the said Mohd. Yusoff bin Muda, by inducing him to believe that you were the developer of the scheme known as Taman Bukit Sitara and that the sum of RM570 was required as part payment of under counter money for the purchase of a terrace house in the scheme and the said Mohd. Yusoff bin Muda would not have paid you the said sum of money had he not been so deceived, and, that you have thereby committed an offence punishable under s. 420 of the Penal Code.

3rd Charge

That you on 12 February 1982 at the about 11.50 a.m. at your office Tara & Associates, MARA Building, No.21 Jalan Lemon, in the District of Seremban, in the State of Negeri Sembilan, attempted to cheat Mohd. Yusoff bin Muda by dishonestly inducing him to deliver to you a sum of RM1,000 which was the property of the said Mohd. Yusoff bin Muda, by inducing him to believe that you were the developer of the scheme known as Taman Bukit Sitara and that the sum of RM1,000 was required as part payment of under counter money for the purchase of a terrace house in the scheme and the said Mohd. Yusoff bin Muda would not have paid you the said sum of money had he not been so deceived, and, that you have thereby committed an offence punishable under s. 420 read with s. 511 of the Penal Code.

The trial of the appellant on the above three charges, two of which for cheating and the third for attempted, cheating, began on 10 January 1983 and ended on 30 October 1984, where the learned President found the appellant guilty on all the three charges. Accordingly the appellant was convicted and sentenced to one year's imprisonment on each charge, the sentences to run concurrently.

The appellant appealed against the conviction and sentence and the grounds of judgment of the learned President were written some 10 months and 18 days after judgment. The learned President had by then resigned from government service nevertheless the ex-President wrote the grounds of judgment.

The appellant was 49 years old (at date of trial) and an advocate and solicitor practising in Seremban. At the material time, there was a housing scheme known as Taman Bukit Sitara in Seremban. The period around 1981 was boom period for housing projects and houses even before being built were sold out like hot cakes.

It was the prosecution case that the appellant had represented himself as the developer of this Sitara housing scheme and this representation had induced the complainant, an ex-army captain (PW3) to purchase a house and pay under-counter money.

The main ingredient of the three charges is in deceit practised by the appellant that he was "**the developer** of the housing scheme known as Taman Bukit Sitara" and because of this deception, the complainant had paid the under-counter money. The complainant would not have paid this under-counter money if he had not been so deceived. The under-counter money amounting to RM2,000 was paid on three different dates, in three different amounts, according to PW3, *viz*:

(a) RM430 on 2 May 1981, the subject of the 1st charge,

(b) RM570 on 5 July 1981, the subject of the 2nd charge, and

(c) RM1,000 on 12 February 1982 the subject of the 3rd charge, which is one of attempted cheating.

The grounds of appeal of the appellant are varied and numerous and can be divided into four main groups:

(1) (a) delay in writing the grounds of judgment, and (b) search list and exclusion of oral evidence;

(2) accomplice and corroboration;

(3) assessment of evidence; and

(4) burden of proof.

I shall now deal with the first group. When the learned President wrote the grounds of judgment on 18 September 1985, he had already left government service. The delay of 10 months and 18 days in writing the grounds is normally not fatal, provided the learned President when referring to particular aspects of the evidence of witnesses, had referred them correctly and had got his facts correct. In this case, there are very obvious errors, *viz*:

(i) In his grounds of judgment on p. 130 of record of appeal, line 12 from the top, the learned President mentioned about the cheque for RM7,000 as a "CASH" cheque. If one looks at Exhibit P1 (on p. 156) it will be obvious that it was not a "cash" cheque but a "CROSSED" cheque payable to "BRAR" (M) SDN. BHD.";

(ii) On p. 134, line 4 from the bottom, on p. 135, line 6, and on p. 140, line 12, the learned President referred to one "En. Jamaluddin of Cuepacs" whose evidence he said he accepted. Nowhere among the 10 prosecution witnesses who gave evidence or the 3 defence witnesses, or even the 7 witnesses offered to the defence, one could locate the name of "En. Jamaluddin". The only name having the ending "Din" is Aliudin b. Hj. Yaacob (PW1), a bank officer with Bank Bumiputra. Definitely he has nothing to do with and could not be the general manager of Cuepacs;

(iii) On p. 139, line 10 from the top, the learned President referred to appellant's assertion that the complainant (PW3) had a grudge against him but this topic was not put in cross-examination of the complainant. If one looks at p. 20, line 7 from the bottom, there was indeed question put to the complainant about quarrel between him and the appellant on commission.

It is not known whether the ex-learned President when writing his grounds had the notes of evidence with him or not. But with such wrong facts above-quoted, it cannot be safely said that the ex-learned President had really considered the evidence in full. The facts are wrong and it is quite obvious that any reasoning based on these wrong facts cannot be sustained, and any judgment arising therefrom is wholly unsatisfactory.

On the point of the search list (Exhibit P50), there was no mention at all in the search list about receipt Exhibit P23. Several Anti-Corruption Agency Officers, after rushing into appellant's office, placed him under arrest. They said they saw the appellant writing this receipt out. They only verbally asked him to stop. All the exhibits taken by the ACA officials that day were written down in the search list, but the vital receipt P23 was not included in this search list. In s. 64 of the Criminal Procedure Code, setting out the requirement of a list of all things seized to be made, the word used is "shall" which is mandatory. The learned President had allowed oral evidence on this P23. The case of *Ah Mee v. PP* [1967] 1 MLJ 220 is in point which clearly shows this oral evidence militates against s. 91 of the Evidence Act, 1950. This piece of inadmissible evidence is very damaging, leading to the learned President saying in his grounds of judgment at p. 144 that the appellant haphazardly "in an attempt to regularise an illegal transaction, with his captors looming large over him" had the presence of mind to write out this receipt. Had the inadmissible evidence of the three ACA officers stating that the appellant after his arrest, had written this receipt, been excluded, the learned President would not have made such a devastating and highly prejudicial comment in his grounds of judgment.

And without the evidence of the three ACA officers saying that the appellant wrote the receipt P23 in their presence after arrest, the production of this receipt P23 did regularise the transaction which is the salient matter of the 3rd charge, and with it the other two charges, as the whole sums of money in the three charges are all accounted for with receipts. Any under-counter money that is backed up by receipt loses the character of illegality and colour of blackness of any under-counter money.

On this ground alone, the appeal must be allowed.

Dealing with the grounds of appeal under the second grouping i.e. accomplice and corroboration, on p. 138, line 11 from the bottom, the learned President had stated that the complaint (PW3) was not an accomplice and whose evidence did not require corroboration. He stated that he accepted that the complainant "consented to pay the RM2,000 under-counter money knowing it was illegal but he certainly did not consent to being cheated." The question of accomplice is whether PW3 had participated in an illegal act knowing it was illegal and if he did not (as the learned President had accepted he did so) then, PW3 is an accomplice. The question of he consenting to being cheated is irrelevant when the Court is enquiring the question of accomplice. Thomson CJ (as he then was) said in *Chao Chong & Ors. v. PP* [1960] 26 MLJ 51 at 52

> ... The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

The learned President had accepted the complainant's evidence in its entirety without even considering whether the complainant knowing it illegal had participated in the illegal act. At least treat his evidence with caution if not with suspicion in the light of so many inconsistencies and improbabilities, examples of which will be found under my discussion of assessment of evidence and burden of proof which now follows.

I shall now come to the grounds of appeal grouped under items (3) and (4) assessment of evidence and burden of proof respectively. The deception that is the main ingredient of the three charges of cheating (the 3rd charge is attempted cheating) was the representation of

the appellant that he was the **"developer of the housing scheme known as Taman Bukit Sitara"** and because of this deception, the complainant was induced to part with his money. The deception must be there and should have acted upon the complainant's mind when he did part with the money. Very strange that this deception, even if not in so many words, was never mentioned at all in the complainant's police report P8 (p. 167). Surely such an important element would have been in the forefront of the complainant's mind when he made this report, especially when he was discussing about the case for about half-an-hour with the head of the Anti-Corruption Agency and thereafter he was asked to make a report. The complainant said it was not important (see p. 21 line 19 from the top). The deception must be the compelling factor and a very important one at that. And if this compelling factor is not important, as the complainant said so, then it is common sense that the complainant's mind was not activated by this deception.

Even after the arrest of the appellant on 12 February 1982 the complainant had written a letter on 20 February 1982 (p. 169 - Exhibit D17) to Ricwal where he did not mention that he was induced by the appellant's representation that he was the developer. He mentioned that appellant was agent ("wakil") of Ricwal. When questioned he explained that by that time he already knew that the appellant was the agent and not the developer. The learned President had described the complainant as a not very intelligent man (p. 145), but in my view the complainant certainly knew how to wriggle out of a tight situation.

There was no documentary or other evidence to back up if not to corroborate the complainant's contention that the appellant had deceived him into believing that appellant was the developer. It was a one man's word against the other. This factor alone should have alerted the learned President's mind to seek for corroboration or some other evidence for support.

On p. 13 (line 12) the complainant (PW3) said he wrote the police report P8 himself and was in his own handwriting and yet the next day (p. 21, line 13) he said the report P8 was written by one Zaidi (PW5).

The learned President had accepted in toto the complainant's evidence and he had completely rejected appellant's testimony saying that the appellant was obviously lying (p. 141). Even though the learned President had stated (p. 141) that his findings were all finding of facts, this does not mean that the learned President had indeed made his findings on facts. The mere insertion of phrase "I made the following findings of facts" without actually evaluating the facts and coming to a judicial conclusion, does not mean anything. There must be something to back up, some assessment, some argumentative dispositions to support one's so-called findings of facts.

The learned Deputy Public Prosecutor for the respondent made a very short submission mainly saying, among other things, that an Appellate Court should not disturb these findings of facts.

The Federal Court in *Syed Abu Bakar bin Ahmad v. PP* [1984] CLJ (Rep) 368 held that in such circumstances the learned President should have minutely and critically analysed the evidence of the complainant (PW3). It is very glaring in this case that the learned President had not scrutinised the complainant's evidence, let alone doing so minutely and critically. Indeed, the learned President failed to give any consideration at all to the evidence adduced by the defence. Even though the learned President had the advantage of seeing and hearing the witnesses and testing their demeanour, his approach to the issue of credibility especially that of complainant (PW3) was so gravely erroneous as to constitute a serious misdirection and make the judgment wholly unsatisfactory (see *Tengku Mahmood v. PP* [1974] 1 MLJ 110).

Moreover, on the first charge, it is the contention of the prosecution that on 2 May 1981 the appellant had taken RM430 as under-counter money. On that day, the complainant (PW3) paid a cheque for RM7,000 for which he was given a receipt. Had the appellant given a receipt for RM6,570 after receiving the cheque for RM7000, then there is this RM430 unaccounted for. Under-counter money as one's common sense will tell oneself, cannot be receipted otherwise it will form part of the price money. The 1st charge, by any stretch of imagination, cannot stand. There was a devious attempt by PW3 (the complainant) stating that the appellant had made a mistake and should not have given a receipt for RM7,000 but should have given a receipt for the amount less RM430. It tantamounts to saying that the appellant had by mistake not committed an offence and for that he was being charged and incredibly convicted thereon.

On the 2nd charge, it is the prosecution contention that the appellant received RM570 on 5 July 1981 as part payment of the under-counter money. Again here, a receipt for that amount was given to the complainant (see Exhibit P2 p. 156). The bank statement of account of Brar (M) Sdn. Bhd. the collecting agent for house bookings (through the appellant) clearly shows the movements of these two payments (see line 5 p. 157 and line 6 p. 158 of Exhibits P3, P4 and P4A). The conviction on this 2nd charge like the 1st charge above, cannot be sustained. The payment was fully documented and receipted.

On the 3rd charge, the charge itself said that the appellant had attempted by deception to cheat the complainant (PW3) by inducing him to deliver to the appellant RM1,000 belonging to the complainant. There is evidence that this money belongs to the Anti-Corruption Agency fund. In fact more than RM1,000 was involved on that day i.e. 12 February 1982. Here again two receipts were made out (see under search list above).

On these grounds alone, the conviction on the 3rd charge cannot stand.

In the circumstances aforesaid, the appeal is allowed and the conviction and sentences on the three charges are quashed.

Lastly, there was this incident of the appellant coming to Court late. The learned President had warned him several times, but on 28 May 1984 when the appellant came late, the learned President ruled that the appellant's behaviour was contemptuous. The appellant had apologised and said sorry but he was fined RM300. There is no record whether the fine was paid.

The appellant was late by 25 minutes on that day. He had apologised and normally the Court should have accepted the apology and carried on with the trial. The Court is of the view that the contemptuous act on the part of the appellant was not of a serious nature, it happens every day and a suitable apology should be sufficient. In exercise of my revisionary powers I quash the order of the learned President and order the fine of RM300 if paid to be refunded to the appellant.

Also found at [1986] 2 CLJ 323